BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, vs. ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	OAH No. N2005060581

DECISION

The hearing in above-captioned matter was held on July 5, 6, 7, 8, 11, 12, 13, and 14, 2005, at Lancaster, California. Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings, presided. Petitioner Student was represented by Arlene Bell, attorney at law, along with his mother. Respondent Antelope Valley Union High School District was represented by Bridget L. Cook, District General Counsel.

After evidence was received, the parties requested the opportunity to file written closing argument and briefs, which request was granted. Further, the hearing was continued so that oral argument, if any, might be heard telephonically. That hearing, set for August 23, 2005, was continued to September 2, 2005, and again to September 6, 2005.

Each party filed its written closing arguments. Petitioner's is identified for the record as Exhibit "NNN" and Respondent's is identified as Exhibit 58. Furthermore, Respondent filed a written motion, renewing a request to introduce a transcript of one of the IEP meetings that took place in this case. That motion is identified as exhibit 59, and Petitioner's opposition thereto is identified as Exhibit "OOO". Finally, as there were many identical exhibits that were offered by each party, the parties produced a chart of the exhibits, correlating them. That document is identified as Exhibit 60.

Counsel for both parties appeared telephonically for the further hearings held on September 2 and September 6, 2005. During those telephonic proceedings, the ALJ ruled that Respondent's motion to admit the transcript of the IEP was denied. The case was submitted for decision on September 6, 2005, at the end of the telephonic hearing. The ALJ hereby makes his factual findings, legal conclusions, and orders, as follows.

INTRODUCTION AND STATEMENT OF THE CASE

Petitioner, a student at one of the District's high schools, is eligible to receive special education services. In his request for a due process hearing, he alleged that he was denied a "free and appropriate public education" (FAPE) during the 2004-2005 school year. In support of that general claim, Petitioner alleges that the Respondent school district failed to provide agreed-upon speech and language services, failed to provide small-group tutoring and a module of a program known as FastForWord,[1] and failed to consider an assessment report prepared by a private consultant, despite a promise to do so. Further, Petitioner asserted that the school district did not provide a FAPE by failing to provide academic services and transition services, and by failing to insure that Petitioner met academic proficiency levels. Finally, he alleged that the District failed to inform all of his teachers about his special education needs. Petitioner seeks compensatory services.

Some of the services at issue in this proceeding were the subject of an agreement reached by the parties during a mediation conducted in September 2004. At that time the Respondent agreed to provide certain services and to further define and refine them in the Individual Education Program (IEP) process.[2] Consequently, that mediation agreement and its interpretation is a central point in the resolution of the parties' claims.

Respondent acknowledges some shortcomings in the provision of at least one program mandated by the mediation agreement—speech and language services—but otherwise contends that any other failings that might have occurred did not prevent the Petitioner from receiving a FAPE. Further, it asserts that in some cases Petitioner and his parent failed to follow through to obtain services contemplated by the parties.

During this proceeding 16 witnesses testified, and hundreds of pages of documents were received in evidence. Petitioner prevailed on some issues but did not prevail on others. Some compensatory education services will be ordered as a result of the school district's failure to provide a free and appropriate education.

FACTUAL FINDINGS

The Parties and Jurisdiction:

1. At the times relevant to this matter, Student[3] was a student attending Quartz Hill High School (QH), a school in Respondent Antelope Valley Union High School District (District). He began his senior year at QH in the fall of 2004, and turned 18 on September 17, 2005.

[1] The claim that the District was obligated to provide further training through FastForWord was resolved at the outset of the hearing by stipulation.
[2] See Legal Conclusion 6 for a summary of what must be included in an IEP plan.
[3] Petitioner's surname is omitted to protect his privacy, as is his mother's and his step-father's.

2. Petitioner is a student with exceptional needs, qualifying for special education and related services under several categories, including specific learning disability and speech, and other health impaired. He has received special education since the first grade. Student lives with his mother and his step-father.

3. This proceeding commenced in May 2005, when Petitioner filed a request for a due process proceeding with the California Special Education Hearing Office (SEHO). Petitioner's mother filed for a "stay-put" order, which was granted by SEHO on May 17, 2005. (Ex. MM.) Beginning July 1, 2005, the Office of Administrative Hearings (OAH) took over the conduct of these proceedings from SEHO.

4. There is no dispute that Petitioner is entitled to special education and related services. Instead, as noted above the dispute centers on what services should have been provided, whether some aspects of the services that were provided in fact were deficient, and in either case, whether a FAPE was denied to Petitioner. There is no dispute that jurisdiction was established to proceed in this matter.

Petitioner's Educational Background:

5. (A) Petitioner is a young man who has faced substantial developmental challenges as well as significant educational challenges during his 18 years. For example, he experienced breathing problems shortly after birth, and by age three he had undergone two open-heart surgeries. He suffers from epilepsy, first experiencing a seizure at about age three. He also has possible cardio-pulmonary insufficiency, and is allergic to latex and eggs. (See Ex. 23, p. 1) Various other diagnoses have been made, including attention deficit disorder, receptive/expressive language disorder, and abnormal auditory perception (Ex. 19, p.1), and it is reported that he was found mildly dyslexiac. (See Ex. F., p. 2.) All of those conditions could affect his ability to access instruction in the public schools. According to school records, his IQ was found at 87 (performance) and 85 (nonverbal) during testing performed in October 1997, and he is therefore deemed to be in the low average range of intelligence. (See Ex. 14, p.1.)

(B) As noted in Finding 2, above, Petitioner has received special education for virtually the entire time he has been a student. A review of his history, set forth in a District evaluation report from April 2005, reveals that in 1994 the Los Angeles Unified School District found "psychological processing deficits" in the areas of conceptualization, comprehension, visual-motor integration, and possible visual and auditory processing memory problems. He then met speech and language impairment criteria. (Ex. 14, p.1.) In the fall of 1997 Petitioner was assessed by the Palmdale School District. It found Student to have significant difficulties with tasks involving long-term memory, short-term auditory memory, and association. He was, however, exited from speech and language services at the October 1997 Triennial IEP but was still found to meet the criteria for Specific Learning Disability. (*Id*.) That finding was also made at the 2000 Triennial IEP, conducted at Palmdale School District when Petitioner was in the eighth grade. (*Id*., at p. 2.)

6. Petitioner was placed in a special day class when he enrolled in the District. (During his first year he attended Lancaster High School). When he moved to QH in October 2001 for the tenth grade, various educational goals were set for him, and he remained in special day classes. (See Ex. 23; Ex. 10, 11, 12.) The next year, a special IEP was held to develop an individual health plan, which dealt with his seizure and heart problems. (See generally, Ex. 14, p. 2; see Ex. 11 for the specialized health plan.) Due to concerns about his heart, Student attended modified physical education classes and some restrictions were placed on his physical activities. During his senior year he had a one-to-one aide in attendance as a support in the event of a seizure.

7. (A) The District has long been on notice that Petitioner suffers from significant auditory processing problems that would interfere with his ability to access his education. The October 2000 triennial IEP, conducted the year before he came to the District, stated there were deficits in sensory-motor integration and audio processing, and it is reasonably inferred that the District had access to that document. (See Ex. 23, p.1.) In October 2003, a District psychologist conducted a re-evaluation of Petitioner. That psychologist, Noel Swanson, noted in his report that Petitioner suffered from auditory processing deficits, and he therefore administered a test to assess the extent of that impairment. (Ex. 23, p. 2.) Mr. Swanson used the Test of Auditory-Perceptual Skills—Upper Level, Revised (TAPS).

(B) The TAPS is a standard testing instrument, designed to examine how a person interprets and understands what he or she hears. (Ex. 23, p. 2.) The test included four subparts. On three of those four subparts, Student's scores placed him in the first percentile; his scores were more than two standard deviations below the mean, and in two cases were close to being three deviations below the mean.[4] On the fourth subpart, he scored in the fifth percentile.

(C) These scores indicated that he would tend to have trouble remembering information given to him verbally; he would demonstrate short-term memory problems, he would have difficulty remembering two-syllable and compound words, and he would have problems recalling information sequentially. The test indicated that Petitioner might not recall information right after his teacher spoke to him, and thus he would have trouble listening to a question and then reasoning out the answer mentally, without paper. (*Id*., pages 2 and 3.) During the hearing, Mr. Swanson acknowledged that the test results indicated that Petitioner's performance on the TAPS test indicated that his auditory processing problems were "severe."

(D) Mr. Swanson did not recommend further testing, or therapeutic interventions for Petitioner. He did make numerous recommendations for teachers and/or Petitioner, such as having the teacher stop at times in a presentation to see if Student was comprehending the material, or to have the student repeat back the directions, explanations,

[4] The mean score on the TAPS is 100, with a standard deviation of 15. On one subpart his score was 60, and on another 61; 55 would define the third deviation below the mean.

or instructions, or for Petitioner to practice building his memory skills by repeating information such as phone numbers and dates of events. (Ex. 23, at pp. 5-6.) Mr. Swanson testified at hearing that the list of recommendations is a standard one the District uses whenever staff discerns a student to have auditory processing and memory problems. However, the recommendations were not specifically placed in the Petitioner's IEP documents, and there is no evidence that any of his teachers, besides his "case carrier" were aware of these recommendations.

8. (A) In October 2003 Petitioner took an academic achievement test, the Wechsler Individual Achievement Test—Second Edition (WIAT). According to the October 2003 assessment report, the test was administered by Johan Mekel, but at hearing Mr. Mekel disclosed that another teacher had administered the October 2003 test. Most of the scores on the numerous subparts were in the low average range, but two were not: Petitioner scored 20 points above the mean in oral expression (120 where the mean score is 100), and in the low range in listening comprehension, that score being 71.

(B) No comment on this lone high score—in the superior range—was made by Mr. Swanson in his 2003 report even though it was at odds with all the other scores from the test, and with everything that was known about Petitioner. According to Mr. Swanson's testimony, and that of the lead psychologist, Mr. Beam, no comment would normally be made in the report because the discrepant nature of the score would be obvious to anyone.[5]

(C) Mr. Swanson's assessment report mistakenly reported that Petitioner scored an 80 on the WIAT math composite score. However, Mr. Mekel reviewed source documents before he testified, and reported that the actual score was an 89.

9. Petitioner's mother sought an evaluation of her son's need for speech and language therapy at the IEP meeting held in January 2004, that is, about three months after the assessment by Mr. Swanson. (Ex. 9, at p. 4.) The team determined that "a comprehensive speech and language evaluation" would be conducted by the district's licensed and credentialed speech and language therapist, and that the evaluation would take into account "information and data from past records and to include interview with [Petitioner's mother]; interview, testing and observation with the district, school psychologist, and the case carrier." (*Id.*) The IEP team determined that in the meantime Petitioner's special day class (SDC) was the appropriate program for him.

10. (A) On February 20, 2004, Munna Kumar (Kumar), the District's contract speech and language therapist, conducted the speech and language assessment. Petitioner was then 16 years and 5 months of age. The assessment report that came out of this process, Exhibit 21, is slightly more than one page long. It discloses that two tests were administered: The OWLS and the GFTA; the entire assessment took approximately one hour. The

[5] This is not a completely credible explanation, on its face, and in light of the fact that one of the independent assessors retained by Petitioner took note of the discrepant score, recommending a further examination so as to explain the high score in light of other test results. (Ex. G, p. 6, under "Recommendations.")

assessment process did not comport with that defined in the January 2004 IEP, described in Factual Finding 9, above, in that there is no evidence of a records review, or of an interview of Petitioner's mother or the school psychologist. And, the report does not clearly indicate to a lay reader that Kumar did not use all parts of the OWLS test. (See Ex. G, p. 2.)

(B) According to the assessment report, the OWLS test (neither test acronym is explained in the report) is "designed to determine the ability to understand and function & [sic] to measure the ability to express using verbal language." (Ex. 21, p.1.) According to Mr. Kumar, Petitioner scored an 88 on the comprehension test, where 100 is the standard score, and an 83 on the expression subpart. In both areas he was deemed to perform at the age level of 16 years and 9 months. The other test, the GFTA, was administered to assess Petitioner's ability to produce all phonemes correctly at the word level via picture stimuli. He reportedly performed within normal limits. Based on these two tests, it was recommended that LAS (language and speech) services be discontinued, even though none were then being provided.

11. In the summer of 2004, Petitioner obtained two assessments from private sources. The first was a speech and neuropsychological evaluation from Professor Christiane Baltaxe of the University of California, Los Angeles, and the second an audiometric evaluation from a licensed clinical audiologist, Carol J. Atkins. Both professionals concluded that Petitioner should receive speech and language therapy, auditory processing intervention, and other interventions. (See Ex. 20 and 19.)

12. Meanwhile, in May 2004, Petitioner (through his mother) had filed a due process proceeding against the District, SEHO case number SN04-1277. In that proceeding Petitioner asserted that he had been denied a FAPE between 2001 and 2004. It appears that speech and language problems were at the heart of this prior matter, and it appears to be no coincidence that Petitioner's parents obtained the independent assessments from Ms. Atkins and Professor Baltaxe after the due process proceeding was filed. On September 14, 2004, Petitioner's mother and Petitioner's attorney attended a mediation proceeding scheduled in connection with the then-pending due process proceeding. The District was represented by Ms. Cook, and Mr. Reid Wagner, then in charge of the District's special education program. The parties entered into a written agreement and the 2004 due process proceeding was resolved.

13. The mediation agreement that was executed in September 2004 (mediation agreement) forms the initial reference for many of the claims asserted in the present action. That agreement, Exhibit 27, set forth several terms, the salient ones described as follows:

(A) That the District would provide "speech and language therapy for 3 hours per week in accordance with his school calendar, one hour of which will be provided in a small group at his school through a paraprofessional. The other 2 hours will be provided by a district or contracted speech therapist. These services will be provided beginning the week of September 27, 2004."

(B) That "[s]mall group, remedial tutoring is available after school for one (1) hour a day, everyday which will begin in October 2004."

(C) The District would fund FastforWord during the 2004-2005 school year, or 2005 extended school year (ESY), the amount of time to be funded to be based upon assessments and recommendation of the nonpublic agency that would provide the services.

(D) The District was to complete an assessment of Petitioner in the area of assistive technology, and to conduct an IEP meeting no later than November 15, 2004. At that meeting the IEP team was also to consider the need for additional or different tutorial services.

(E) The District was to reimburse the Petitioner's parents for the costs of the auditory processing evaluation performed by Ms. Atkins. Further, it was agreed that the Atkins assessment "will be considered at the IEP meeting referred to above [November 15, 2004]." Finally, the District agreed to reimburse the parents for the costs incurred by them to obtain the independent speech evaluation from Professor Baltaxe.

(F) The final paragraph of the agreement stated that "this agreement settles any and all educational and financial claims to date, including all attorney fees, against the District on behalf of Student."

14. Petitioner began his senior year—the 2004-2005 school year—with the mediation agreement in place, which agreement for practical purposes modified or augmented any then-existing IEP documents. Per the school calendar, classes commenced on September 7, 2004. (Ex. 55.)

The Speech and Language Services:

15. (A) Petitioner alleges that in contravention of the mediation agreement, the individual speech and language therapy did not commence on time, and he asserts he is owed speech and language therapy because not all of the sessions were provided to him after the program's tardy commencement. As to the group therapy, he alleges he was not provided with an hour per week of group therapy during most weeks, and that the paraprofessional who was to provide the group speech services was not qualified to do so. And, he alleges that the speech and language goals were not made part of the IEP as required, with the individual goals not written in until May 2005, and the group goals never being written in.

(B) In its closing brief the District acknowledges that group speech sessions did not begin until October 11, 2004, and that the individual sessions did not begin until October 21, 2004; in other words, the speech services commenced after the time called for in the mediation agreement. (Ex. 58, p. 6, lines 13-15.) However, as to the individual sessions,

the District argues that all of the hours that were to be offered to Petitioner for individual speech therapy have been provided, and it argues that the shortfall in group sessions asserted by Petitioner is not accurate. (Ex. 58, p. 7, lines 16-17; 21-22.)

16. The task of providing individual speech therapy was assigned to Geraldine Watts, a licensed speech therapist, working under contract with the District. The task of providing group speech therapy was assigned to Eddie Cook, a "paraprofessional" employed by the District. As acknowledged by the District in its closing brief, the first group session was held on October 11, 2004, and the first individual session was held ten days later.

17. (A) Prior to the first individual speech and language session, Petitioner's mother met with Ms. Watts to discuss goals and strategies for the individual group therapy. The two came to an understanding of what would be done, but the goals and their attendant benchmarks they agreed upon were not written into the IEP documents until the following May, when the school year was all but over. It should be noted that according to the November 2, 2005 IEP, the team tabled a discussion "of the specifics of the delivery of Speech & Language services" until a meeting to be held in December of that year. (Ex. 6, p. 6 of 13.) However, another meeting was not held until February 7, 2005, but the speech and language goals were not written into the IEP then. And, Ms. Watts had not been invited to the November 2004 IEP. Thus, the entire IEP team did not meet to discuss the individual speech and language goals.

(B) Between October 2004 and July 2005, Petitioner and his mother worked with Ms. Watts to meet the goals that the parent and therapist had agreed upon, and as detailed below, many goals were met, and substantial progress was made by Student. While the failure to write the individual speech and language goals into the IEP documents in November 2004, January 2005, and March 2005, constituted a procedural violation of the laws and regulations governing the provision of special education, such violations did not deny Petitioner a FAPE. It is found that those goals were appropriate to meet Student's educational needs, and were designed to assist him in accessing his education and to confer an educational benefit upon him.

18. (A) The District agreed to provide two hours per week of individual speech to Petitioner. There was some dispute over how many weeks were included in the school year, as the District does not appear to consider some weeks that have less than five school days to be a week. Mr. Wagner testified that the regular school year was 35 weeks, and that Respondent was therefore obligated to provide 70 hours of individual speech services. The school calendar shows 180 instruction days during the regular year, which, at five days per week would amount to 36 weeks. Under these circumstances, Mr. Wagner's assessment is accepted. Ms. Watts' notes and records indicate that she provided 63 hours of services between October 21, 2004, and June 2005. An additional hour of service was provided in July 2005. It should be noted that during the first semester, Ms. Watts made efforts to make up the hours that had not been provided at the outset of the year by providing services during school holiday periods such as Thanksgiving and Christmas. The District asserts that where the Petitioner was sick, cancelled appointments, or otherwise did not appear for his

individual intervention when scheduled, the District is not obligated to make up that time. District has not, however, provided clear authority to support that position.

(B) During telephonic oral argument on September 6, 2005, Petitioner's attorney represented that he had received an additional ten hours of services from Ms. Watts since the end of the evidentiary phase of the hearing. While the District's counsel did not know whether such was accurate, the Petitioner should be bound by that statement as an admission.

19. By July 2005, Petitioner had met three of his five main goals for individual speech and language therapy. Ms. Watts credibly testified that Petitioner and his mother had worked diligently to meet his goals, and that the therapy had facilitated his ability to benefit from his education and had in fact made it possible for him to complete his senior project. In Ms. Watts's opinion, he could reach the other two main goals, numbers 2 and 3, if he continued to apply himself to the tasks set for him, at the rate of two hours of direct therapy per week for one to two semesters.

20. As to the agreed-upon group speech and language services, numerous sessions were not provided to Petitioner and it is clear that the sessions that were provided were of little or no value. The person assigned to perform the services was not properly qualified or supervised. Further, no goals were ever developed for these services, either outside or within the IEP process.

21 (A) The District acknowledges in its closing brief that, at best, Petitioner attended only 15 group sessions during the entire school year and that each session lasted only 30 minutes, as opposed to 60 minutes. (See Ex. 58, pp. 7-8.) The contention that 15 sessions were provided is based on the logs created by Mr. Cook. The accuracy of the logs has been challenged by Petitioner since prior to the commencement of this proceeding.

(B) The logs generated by Mr. Cook are unreliable. A handwritten version, where Petitioner signed the log to indicate participation in a session, has been called into question because Petitioner contends that in some cases he was persuaded by Mr. Cook to sign for sessions after they occurred, and for sessions that did not occur. In fact, Petitioner noted on two entries that he had signed them in March, after the date of the sessions. More problematic is the typewritten version of the log maintained by Mr. Cook (entitled "speech notation form"). It indicates that on December 6, 2004, the session pertained to the subject of good or bad choices in life. According to Mr. Cook, this session took place on a day that Student was serving an on campus suspension following his verbal altercation with a security guard. However, the altercation that led to the discipline occurred on December 8, and the detention was not served until December 13, 2004. (See Ex. V.) It is readily inferred that Mr. Cook's typed log was not maintained in a contemporaneous manner, but rather was created, in whole or in part, after Petitioner's mother demanded copies of the logs. (See the February 2005 IEP, Ex. 4, p.5.)

(C) Virtually none of the group sessions actually involved a group; Cook's typewritten log shows that only three of the fifteen sessions were group sessions: those held on October 25, November 1, and November 15, 2004. (See Ex. 37.) And, those three sessions involved only Student and one other student. Mr. Cook asserts that at some time after that last group session, Mother. told him to stop holding group sessions with her son. She denies that claim. There are no records of any type to corroborate Mr. Cook's claim, which ultimately is a claim that he and Mother made an oral agreement to modify the mediation agreement. He is not a person authorized to modify the mediation agreement, and neither he nor Mother. were competent to determine if this was a therapeutically sound decision. It can not be found that there was a valid agreement to modify the mediation agreement, and thus it must be concluded that the District can show that it only provided 1.5 hours of group speech services during the 2004-2005 school year, in violation of the mediation agreement.

22. (A) The few sessions that were provided—including the three group sessions—were of little or no value in terms of speech therapy, in that Mr. Cook has little qualification to provide such services. He was providing the services without any goals set forth in any IEP document, and he was doing so with virtually no supervision by a qualified speech therapist. Indeed, the District could not show that what he was providing fairly fell into the rubric of speech therapy or speech and language services.

(B) The District classified Mr. Cook as a paraeducator or paraprofessional. Such generally describes any of a number of aides employed in any number of roles. All have one thing in common: they need not be heavily qualified for their assignments. According to Mr. Wagner, who headed the District's special education unit until July 1, 2005, all that is needed to obtain such a position is two years of college education and a pass score on a general knowledge examination. From Mr. Wagner's description, the general knowledge exam is not the most stringent test and should be passed by an individual who has received two years of college education.

(C) Once hired by the District, Mr. Cook received some training from the District. This was mainly accomplished through group instruction, and it is inferred from the testimony that the training was not in-depth. Mr. Cook and the other aides providing speech and language services were theoretically subject to supervision on the job, but little supervision or guidance was provided. According to Mr. Cook, the supervision mainly took the form of occasional meetings with Mr. Kumar, but these meetings did not occur on a routine basis. Mr. Wagner attested that Kumar was responsible for more than 300 cases, which were administered through a number of aides like Mr. Cook.[6] Mr. Kumar was never present when Mr. Cook worked with Petitioner. Kumar never designed a program for Mr. Cook to carry out with Petitioner; again, no group goals were ever set out in any IEP. Furthermore, Mr. Kumar did not do any lesson planning with Mr. Cook nor did he provide Cook with a program for social communication, although at some point he told Mr. Cook to

[6] Mr. Cook testified that one reason he could not provide an hour per week of services to Petitioner was that he was training five new aides.

work on "positive communication" and word pronunciation. But, Mr. Cook did not really know what pronunciation to work on with Petitioner. At the same time, Mr. Cook had no contact with Ms. Watts, who was providing the individual speech and language services, and thus there was no chance to coordinate what appear to have been related activities.

(D) Ms. Watts made it clear in her testimony that a program where a speech therapy aide would provide unsupervised group therapy is wholly inappropriate, even if that aide were licensed. In her opinion, those acting as speech aides require virtually hands-on supervision. Here, Mr. Cook is not a licensed speech therapy aide, and it would be even more inappropriate for him to provide such services. Ms. Watts is of the opinion that aides should almost never work alone with students, and their tasks should be limited mainly to conducting drills with relatively advanced students who have shown high proficiency in the drills being administered. Mr. Cook was not performing that type of service with Petitioner.

23. Petitioner has argued that the provision of services by a speech and language aide is governed in part by laws and regulations pertaining to licensed, as opposed to credentialed, speech therapists and speech therapist aides. The District has argued that the mediation agreement clearly referred to a paraprofessional, meaning an aide whose training and activities are governed by the Education Code and related regulations, all pertaining to the activities of credentialed persons. In support of its position, the District cites section 3051.1 of title 5 of the California Code of Regulations. However, that regulation provides that an aide may be used when under the "direct supervision" of a credentialed speech therapist; further, that supervising speech therapist may not have more than 55 cases without written permission of the State Superintendent, and no more than two aides may be supervised by such a credentialed party. Here Mr. Kumar had some 300 cases, nearly six times the proper amount, and the State Superintendent had not provided consent for such a caseload. Mr. Kumar was ostensibly supervising more than one aide and in any event his supervision can not be deemed "direct" under any definition of the term.

24. Group speech and language services were important to Petitioner's education, including his ability to make a transition from high school to the community and working world. Mr. Beam, the lead psychologist, testified that social development was necessary for Student to succeed in the real world, and that this agreed-upon service was important to his transition.

25. Mother. had raised concerns about Mr. Cook's qualifications as early as November 2004. (Ex. 6, p. 6.) It must be found that her concerns were well founded. Mr. Cook had minimal qualification to provide a therapeutic regime for Petitioner, [7] he was working without appropriate guidance and supervision in any event, and the District was providing his services in violation of applicable state regulations. The fifteen sessions of "group" services provided no educational benefit to Petitioner.

[7] For example, Mr. Cook testified that he often read assessments and reports regarding his students, but was not always able to understand the reports.

Small Group Tutoring:

26. The mediation agreement stated that small group tutoring "is available" one hour per day, every day. When Petitioner first went to a tutoring session, he found it to be crowded, with perhaps 20 students in attendance; all the seats were taken. The session was not conducted in an entirely orderly manner. He came back on another day, hoping that the size of the group in attendance would have diminished, but it had not. Petitioner then perceived that it would be difficult to obtain meaningful tutoring in that situation. Based on the testimony of Atkins and Baltaxe, their reports, and the District's documentation of Petitioner's auditory processing problems, it would in fact be difficult for Petitioner to work effectively in a large and noisy group.

27. When the after-school tutoring proved too daunting, Petitioner did obtain help outside of class time from some of his teachers. He went to see some teachers in the morning, including his math teacher, his writing teacher, and his English teacher. He did not obtain help in economics and civics, but it was not demonstrated that he sought help in those classes.

28. During this proceeding, an issue was raised to the effect that the tutors were not special education teachers, but the mediation agreement did not specify that tutoring would be conducted by special education teachers. Based on the record in this case, it has not been established that the District failed to make small group tutoring available to Petitioner.

Consideration of the Carol Atkins Report:

29. As noted in Findings 11 and 13, above, Petitioner's mother obtained an evaluation from Carol Atkins, and during the mediation process the District agreed to pay for that report and to consider it. Petitioner contends that the report was not considered, a claim denied by the District. A review of the report is important to resolve this dispute.

30. Ms. Atkins' evaluation and report followed the nueropsycholinguistic evaluation made by Professor Baltaxe. Both evaluations were thorough and the reports were detailed; the Atkins report is seven pages long. Ms. Atkins utilized seven instruments to evaluate the Petitioner, reviewed the Baltaxe report, the triennial report prepared by Mr. Swanson in October 2003, and the report generated by Munna Kumar in February 2004. Ms. Atkins concluded that Petitioner suffers from central auditory processing disorder with six different aspects of disorder.

31. Ms. Atkins made a number of recommendations in her report, including further testing, such as a neuropsychological evaluation to explore Student's ability to obtain a high score on the WIAT test's oral expression subpart (see Findings 8(A) & (B)) while scoring in the low average to disordered range in other measures. She recommended central auditory processing therapy through the FastForWord programs. Further, she recommended speech and language therapy that would be oriented to address a number of Petitioner's problem

areas; tutoring in deficit areas such as reading, and a device for auditory training, such as the Phonak EduLink. Ms. Atkins also endorsed a number of the recommendations that Mr. Swanson had set forth in the October 2003 triennial report. (See Ex. G., pp. 6-7.)

32. (A) Contradictory testimony was presented on the issue of whether or not the Atkins report was "considered" by the District. The IEP minutes, however, indicate that the Atkins report was discussed and considered, a review of the November 2, 2004, IEP document directly references consideration of the report. (See Ex. A.)

(B) The typewritten minutes—beginning on page 5 of 13—state that the "team is meeting to discuss Student's Assistive Technology Assessment." At about the middle of that page, standing alone, is the statement: "The assessments of independent evaluators were included in the overall discussion of the IEP." At the next page, it is stated that the District will fund "Fast For Word." This is a program recommended by Ms. Atkins, as well as Professor Baltaxe. Further below, it is stated that among the tabled issues to be taken up at the next IEP meeting would be "a discussion of the specific recommendation of an outside assessor regarding the 'Phonak EduLink' Device." As found in Finding 31, above, this is a device that was recommended by Ms. Atkins; it was not mentioned by Professor Baltaxe.

33. While Mother. was not in agreement with all of the outcomes set out in the November 2004 IEP, she did not object to the minutes as written. In such circumstances the documents should be deemed a reliable summary of the events, sufficient to establish that the parties discussed, and thereby considered, the Atkins report. Petitioner therefore has not prevailed on this claim.

Provision of Appropriate Academic Instruction and Programs:

34. Petitioner alleged that a FAPE was not provided in Petitioner's senior year due to the District's failure to "provide appropriate academic instruction and programs." (Petitioner's Statement of Issues dated June 6, 2005, p. 2.) In his closing argument, he asserts there were such deficiencies in his reading and writing, that there was a failure to instruct while he was on home teaching, and that an unreliable proficiency test score has been relied on by the District.

35. Petitioner's IEP for February 2005 set out a goal for writing, to the effect that Student would be able to write and type a three to five paragraph essay using correct form, spelling, and grammar independently as measured by work samples achieving a criteria of 85 percent (or a grade of B) for a period of 10 weeks. According to the District, Student met this goal. (E.g., Ex. B.)

36. (A) It can not be found that Petitioner met his writing goal after reading samples of his writing that were received in evidence. For example, Petitioner's Exhibit JJJ contains two handwritten documents. One is entitled "Research and Project, dated May 11, 2005." It reads as follows, which include corrections made by Respondent's aide:

> My project, I have learned that eating health can make a difference because Your skin is lighter hair softer and our eyes is brighter than before. Every-Body should have a diet plan, because to loss weight and to look beautiful. Exercise three times, a week, because to look younger and to have a Wonderful body. You can also follow the food pyramid too.
>
> It was correct by Tony hamar, Mrs. Brown assistant
>
> (All errors in the original.)

(B) Also illustrative is the first page of Exhibit JJJ, apparently a draft for Petitioner's senior project, where a student is to write about his or her future. The title of the document is unclear in the copy, but the text reads as follows:

> The things I have learned in Highschool is Math, History, and Science. I always wanted to be a <u>fire frighter</u> because to save people lives and I would risk my own life for anybody. I also wanted to become a <u>LAPD S.W.A.T</u>. team, because rescue people who are in danger. or to become a <u>Lawyer</u> because to fight Justice and freedom to the who I'm fight for.
>
> (All errors and the underlining in the original.)

37. (A) By May 19, 2005—less than one month before he was slated for graduation—Petitioner's essay about proper nutrition had evolved into a short typewritten paragraph, as follows:

> My project I have learned that eating too much can cause some cancers, Gallbladder disease, gout, heart Diseases, stroke, diabetes, Osteoarthritis, high-pressure and Sleep Apnea. Eating Healthy, exer-Casing, and Always have a diet plan can make a Difference because your body changes
> And you brain functions better than before. Your veins, arteries, and Our Nerves system will be better than Before how it is used to be. Your body will be stronger and faster.
>
> (Ex. CCC, p.1; all errors from the original.)

(B) What appears to be a later version of Student's paper on career goals is found in Exhibit CCC, at the third page. This version is typewritten and entitled "Career plan" (sic), and would appear an improvement over the handwritten version quoted in Finding 36(B), above. Nevertheless, it contains numerous spelling, punctuation, grammar and word-usage problems, as seen below:

> I am interested in several fields of study. I have not decided whether to become a math teacher. As of right now I think I would like to become a lawyer in Special Education. My plan is to intend Antelope Valley Junior College for two years after that I would like to attend UCLA or Harvard for reminder of my studies. I would like to keep my options open as far as becoming a math teacher. There are many educational opportunities for students who are disabilities I plan of these opport-unities to take advantage of these opportunities help me to succeed. I have a strong desire to succeed in life, and I am willing to work hard toward this goal.
>
> (All errors in the original.)

38. None of these are indicative of independent work where an essay is composed with correct form, spelling, and grammar, meeting an 85 percent criteria (i.e., a grade of B). At the same time, other writing samples are the product of extensive input from Petitioner's teacher, Ms. Brown, who confirmed that she all but wrote them. (See Ex. HHH and III.) Exhibits CCC and JJJ should also be compared to the writing sample obtained by Professor Baltaxe when she evaluated Petitioner in July 2004. She had asked him to describe, in writing, what he had done that day before coming to see her. He wrote, in printed hand:

> Student, I got up and did some push-ups, lift-up weight. Put some clothes on, fixed my bed and clean my room. Clean-up and (crossed out) brush my teeth, comb my hair (corrected from 'har') and clean up my face. My mom and I to get some breakfast from Del toca. We left off (crossed out of an illegible word) from traffic. Then (crossed out "n") End.
>
> (Ex. F, p. 11; parentheses in original to identify errors in spelling and usage.)

A comparison of this sample with the two quoted in Finding 36(A) reveals little progress in the area of writing during a ten-month time span.

39. According to the February 7, 2005 IEP document, Student had then met the goal of drafting a three to five paragraph essay, as described in Finding 35, above. (See ex. B, p. 7.) That this goal had purportedly been met can not be reconciled with the writing samples generated three months after that IEP date. This IEP statement—that Petitioner had met the writing goal—is repeated in the May 9, 2005 IEP, and can not be substantiated by the writing samples set forth above in Findings 36(A) and 37(A), which were produced by Petitioner after that last IEP.

40. Petitioner did not meet his goals in reading either. Not only do the IEP documents show that the reading goals had not been met, Ms. Brown, his case carrier, testified in this proceeding that he had not met his reading goals. (See Ex. 4, p. 6; Ex. 2, p. 8, and Ex. 1, p. 8, the February, March, and May 2005 IEP's, respectively.)

41. (A) In April 2005, Ms. Brown went to Petitioner's home and again administered the WIAT tests. They were reported by Mr. Swanson in a psychological report addendum later that month. (See Ex. 14.) A comparison of those scores with those garnered by the same test instrument in October 2003 shows that in some areas Petitioner had made progress, but that in other areas, he had not, and had even shown significant declines.[8] Thus, on the Reading Composite, where he scored a 75 in 2003, his score was 76 in 2005, which shows slight improvement. However, the math scores, usually a strength area for Student, had declined. The Math Composite score had declined from an 89 to a 77, with both of the subtests showing a significant decline.[9] The Written Language Composite showed a three point decline, from 80 to 77; on the spelling subtest Petitioner had made great improvement, from 68 to 86, but had shown a steep decline in the written expression subtest, from 96 to 71.

(B) The Oral Language composite score showed a drop from 94 to 64, but this must be viewed in light of the fact that the District now acknowledges that the oral expression subtest score of 120 on the earlier WIAT was indeed a discrepancy. Nonetheless, the listening comprehension score had declined ten points, from 71 to 61.

(C) According to Mr. Beam, the scores in the WIAT are normed, the implication being that a student who maintains the same score year to year is actually making progress, because he or she is keeping pace with their peers from one year to the next. From that point of view, Petitioner had made progress in reading, as his composite score had actually risen one point. On the other hand, by this same reasoning he had fallen behind to some extent in math, and had shown an even more significant decline in written language, a full 12 points drop in 18 months. The drop in the oral language score, of 30 points, is difficult to assess given the problem with the one 2003 subtest score, but the listening comprehension decline of ten points can not be ignored. In the circumstances, it must be found that Petitioner lost significant ground in the are of oral language from October 2003 to April 2005.

The Change of Petitioner's Placement to Home Study and Provision of Services There:

42. In his closing statement Petitioner links these issues with the claim that the District failed to otherwise provide appropriate academic instruction, contending that the change of placement in the spring of 2005 was improper, and that there was inadequate instruction in the home thereafter. (See Ex. MMM, pp. 15-17.)

43. In March 2005, Petitioner suffered medical problems that threatened his ability to attend classes on a regular basis. According to a letter from his physician dated March 25, 2005, Student had been suffering increased seizures beginning in about September 2004, and

[8] Petitioner prepared a chart showing the scores side-by-side, Exhibit ZZ.

[9] As set forth in Factual Finding 8(C), it was revealed in the hearing that the score of 80 set forth in the October 2003 report, which was repeated in Ex. 14, and in Ex. ZZ, was incorrect. The ALJ has written the correction onto Exhibit ZZ for ease of reference in any review.

a change in his anti-convulsion medication in February 2005 had caused an allergic reaction. A subsequent change in medication and the need for a second opinion from a neurologist led Petitioner's doctor to recommend two or three weeks of what he called "independent study." (Ex. II.)

44. The District held an IEP meeting to consider a home schooling program on March 31, 2005. However, the District held the meeting without Mother; while she had some oral notice of the proposed meeting a few days before it occurred, she was not available for the meeting on the date in question.[10] Those in attendance were Ms. Lynnette Brown, Petitioner's Special Day Class teacher or case carrier; a representative of Mr. Reid Wagner, Mr. Swanson; and the school nurse, Ms. Marion Berry, R.N. According to the IEP minutes, "after much discussion regarding independent study and home teaching"[11] the four people present determined that home teaching was the most appropriate educational scenario, the least restrictive environment. (See Ex. C, p. 7.)

45. The plan developed on March 31, 2005, was to provide up to five hours per week of instruction at home, and to provide speech and language services either in the home, or at school. This decision substantially reduced the hours of instruction Petitioner was to receive, as prior IEP's had set 1100 minutes per week as the amount of instruction, an amount nearly four times what he would receive at home. (Compare Ex. C, p. 1 with Ex. C, p. 7.)

46. Mother wrote to Mr. Wagner on April 4, 2005, providing her version of the events that led to the March IEP meeting, and protesting the new placement. (Ex. JJ.) There is no evidence that Mr. Wagner replied to her. Petitioner's physician wrote to the District on May 2, 2005, and stated that Student could terminate his home school program, and he made recommendations regarding a response to any seizures. (Ex. 34.) Petitioner returned to school on or about May 3, but the school nurse sent him home until formalities regarding his return to the campus could be resolved. Petitioner did not return to classes until approximately May 12.

47. The District did not meet the obligation to provide five hours per week of home instruction; rather, it provided approximately seven and one-half hours of instruction during the six weeks and two days that Petitioner was to on home instruction. On some occasions the teachers did not appear, or came late, and on other occasions their tasks were to conduct testing and evaluation rather than instruction.[12]

[10] Interestingly, the IEP document shows that efforts were made to inform Mother. of her rights and to supply her a copy of her rights, even though she was not there. (Ex. C, p. 16.)
[11] It was not made clear as to whether independent study and home teaching are the same things.
[12] Thus, Ms. Brown came to Petitioner's house on April 21, 2005, and gave the WIAT tests described in Factual Findings 41(A)-(C).

Transition Services:

48. The matter of whether the District had provided adequate transition services to Petitioner during his senior year of high school was the subject of a significant amount of testimony. In essence, Petitioner asserts that a smattering of services were provided, wholly inadequate to his needs. Respondent's defense essentially claims that services were provided, and that to the extent that they were not more extensive, that resulted from the failure of Petitioner and his family to pursue the services as they should have.

49. (A) Transition services are defined in California law at section 56345.1, subdivision (c) of the Education Code[13] as a "coordinated set of activities" that are designed with an "outcome-oriented process" which activities promote movement from school to postschool activities. The statute defines transition services broadly, to include further education, supported employment, vocational training, and independent living. The transition activities and plan must be based on the student's needs, taking into account his or her preferences and interests, and the transition activities may include instruction, related services, community experiences, development of employment and other postschool adult living objectives, and where appropriate, the acquisition of daily living skills and functional vocational evaluation.

(B) Section 56345.1, subdivision (b), requires that certain notices about transition be given to the student, and needed transition services are to be set forth in the IEP after the student turns 16. This may include a statement of interagency responsibilities and linkages. Further, section 56345, subdivision (a)(8), requires that the student be informed that his educational rights will transfer to him at age 18, and that notice must be given at least one year before that birthday.

50. The District did not comply with its obligation to provide a notice to Petitioner regarding the transfer of educational rights to him at his age of majority. Although the IEP documents contain a space that can be marked to show that such a notice was provided, none of the IEP's from before or after his 17th birthday show such a notification. (This notice box is found on the page where the IEP participants sign the document.) Further, no separate documents establishing that such a notice was actually given to Petitioner were introduced into evidence. Therefore, Petitioner has established a violation of this statutory rule, which is a procedural violation.

51. (A) As to the actual transition plans that were made and actions the transition actions that were taken, the documentation reveals that some planning and discussion took place over a period of approximately two and one-half years. On October 22, 2002, an Individual Transition Plan (ITP), part of the IEP held at that time, was prepared. The IEP itself, at page 3, shows that transition would be from high school to post secondary education, and referenced the ITP. The ITP section provided that Student had long range

[13] All further statutory citations are to the Education Code unless stated otherwise.

goals for employment as an auto designer and long range goals for higher education as a full-time college student in order to study engineering. The ITP also provided that Petitioner would undergo a vocational assessment by October 2003 and that he would enroll in a vocational class and apply for a library card. (See Ex. 12, p. 5.)

(B) A second October 2002 IEP document, dated October 24, shows that transition would be from high school to post secondary education, but there is no separate ITP section in that document. (See Ex. 11, at p. 3 of 4.) The broad goal of transition to post secondary education was repeated in the May 2003 IEP, but no separate ITP documentation can be found in that IEP. (See Ex. 10.)

(C) The triennial IEP held in January 2004, the middle of Petitioner's junior year, does refer to transition as a topic, and it does provide some information, although no separate ITP was prepared and placed in the IEP document. The minutes of January 2004 IEP state that "goals and objectives will continue as written from the last IEP as with the transition plan . . . ." (Ex. 9, p. 4.) The minutes go on to provide that Petitioner had completed coursework in business information technology and industrial technology to "address his/her vocational/care interests." (*Id*., p. 5.) The minutes also state that Petitioner would "explore options within the YES (youth employment skills) class" and that he had "confirmed eligibility for" Department of Rehabilitation, possibly through the WECARE/YES program."[14] (*Id*.)

(D) Transition services were one of the topics of the IEP held in November 2004, the first semester of Petitioner's senior year. The minutes from that IEP state that "Student and his mother will conference with a transition specialist from the District's WE CARE program prior to the next IEP." (Ex. 6 p. 6.) The ITP forms that are part of the IEP document show that after high school Petitioner would have part time employment, and for further education would attend college full time to study "education/mechanical engineer[ing]" and carpentry in a trade/tech school. (*Id*., p. 12.) Presumably, one of these post high school education goals would at some point be chosen over the other. The ITP statement of needed transition services and activities included obtaining an identification card and learning to ride public transportation; completion of a visit to a work site in a career interest area; and, Petitioner was to expand his daily living skills by activities such as learning about nutrition and ordering food and other items out in the community. (*Id*., p. 13.)

(E) The ITP statement of needed transition services and activities did not change at the February 7, 2005, IEP. (See Ex 4, p. 11.) The minutes of that meeting do not speak to any transition issues. The same applies to the IEP from March 2005, when Petitioner was placed on home study. (Ex. 2.)

(F) The last IEP documents, from May 2005, contain ITP forms. Those continued to show carpentry or education/medical field as Petitioner's post high school

[14] WE CARE is an acronym for the "Work Ethics Career And Real life Experience" program; YES is the Youth Employment Skills class.

goals. On the activity sheet, it is stated that the objective of completing a work site visit in a career interest area had been completed, as well as the daily living skills goals. (Ex. 1, p. 7.) However, the first goal had not really been met; Petitioner had gone off site to an occupational school site where he could see how others received training for various trades, but he had not gone to a medical facility or some place of business where carpentry was actually practiced. The minutes from this last IEP document do not record any discussion of transition issues. (See Ex. 1, pp. 4 and 5.)

52. (A) Aside from writing an essay about career goals and going on the field trip to the West Valley Occupational Center to see how various trade skills were taught, Petitioner received few other significant transition services. To be sure, he did receive some vocational counseling provided by the school psychologist in his DIS counseling sessions, and he was offered the opportunity to participate in another field trip, wherein students were taken to a local shopping mall so they might see how to file a job application, and gain some understanding of day-to-day work skills. However, through a misunderstanding between Petitioner's mother and Ms. Remy, the school transition specialist, he did not actually go on that field trip.

(B) As noted in Finding 50(D), above, the IEP for November 2004 referred to Petitioner and his mother meeting with the transition specialist to discuss enrollment in the YES or WE CARE program. That did not occur before the next IEP meeting, as the November 2004 IEP minutes indicate. Ms. Remy had no notice from the IEP team that she should meet with Student or his mother, and Mother failed to initiate a meeting either, until it was too late to access significant services from Ms. Remy.

(C) Because Petitioner was not enrolled in the YES program, he was unable to access the Department of Rehabilitation programming without a wait of many months. That is, students enrolled in the YES program had priority access to Department of Rehabilitation programs. The District did establish that enrollment in the YES program had been discussed in Petitioner's junior year, in June 2004, but that Mother decided that Petitioner should not take the class, but should take Spanish instead. However, it is inferred that Mother. did not understand the effect of the decision, that not scheduling the YES class for the fall of Student's senior year would leave him without the priority access to Department of Rehabilitation services. By the time that Mother. followed up on this matter in the spring of 2005, there was no real chance for Student to use the YES program.

53. Based on the foregoing, it can not be found that there were a coordinated set of activities utilized with the purpose of promoting Petitioner's movement to postschool activities. Aside from assuring that Petitioner received enough courses to obtain a diploma, little else of substance was provided. Further, while the IEP and ITP documentation indicates that goals were stated that may have met Petitioner's preferences, the goals were not specifically designed to meet his needs, given his particular physical handicaps and learning disorders.

Assessment of Academic Proficiency Levels:

54. In his closing argument, Petitioner distilled his claim that he was denied proper assessment of academic proficiency to three issues: that his WIAT testing was deficient; that he received assistance on his Language Arts Proficiency Test from the teacher who administered that test, and that he may have had help on some math tests over a period of time.

55. (A) As set forth in Factual Finding 8, Petitioner scored substantially above the mean in one (and only one) subpart of the WIAT test administered in October 2003. When that test was administered 18 months later, the score on that subpart had dropped substantially, from 120 to 90. During the hearing, the two school psychologists treated that early discrepant score as one that could simply be ignored, though they could not explain why it was so discrepant to begin with.

(B) Based on this record, the lone discrepant score on one subtest of the WIAT does not establish a failure on the District's part to properly assess Petitioner's Academic Proficiency.

56. Petitioner and a former classmate testified that when they took a proficiency test in the spring semester, 2005, they received help from the teacher who administered the tests, in that they were given answers, and told not to tell their parents what happened. This was denied by the teachers involved. In the course of the hearing it became clear that there was some confusion about just what test was implicated. Petitioner and his classmate testified that they were helped on the Language Arts Proficiency Test (LAPT); the teacher who administered the exam thought the test was a reading proficiency test. While the Petitioner's transcript shows he passed the LAPT in the fall semester (Ex. 50), Mr. Wagner testified that the computer that creates the transcripts would "default" the placement of such test results into the fall semester even if it was taken in the spring semester. A passing grade was required if the Petitioner was to be eligible to graduate in June 2005.

57. Ms. K.D., who testified to the events in question, was also a special education student entitled to modifications in testing methods. She has graduated from the District but had testified to the events question in a special education proceeding of her own. Her testimony during this proceeding, regarding the disputed test, was credible in terms of her demeanor. By her manner and the consistency of her statements Ms. K.D. appeared truthful; she did not exhibit any bias, untoward motive, or prevarication. Petitioner was also credible in his testimony on this point. Because the teacher who actually gave the test provided her testimony by telephone it is somewhat difficult to assess her credibility, at least as to demeanor.

58. In the circumstances, the students' testimony is accepted and the passing score on the language arts proficiency test should be disregarded. However, while there have been legitimate questions raised about some other assessments (i.e., the October 2003 WIAT, and

the speech language assessment from February 2004), Petitioner has not established that a FAPE has been denied as a result of one deficient proficiency test.

The Failure to Inform All Staff About Petitioner's IEP:

59. In December 2004, Petitioner was required to serve an on-campus suspension. This disciplinary step was taken because he left a class early one day, though told not to. He was confronted by one of the school's security guards, and there was an argument. He asserted at the time that under his IEP he was allowed to leave class five minutes early, but the substitute teacher of the class in question did not know that fact. Likewise, he asserts the security guard did not know of the pass. It follows, he argues, that if the District had assured that the substitute teacher knew he was entitled to leave early, there would have been no problem with the guard, and no suspension on his record.

60. The District asserts that Petitioner was discipline occurred because Petitioner engaged in the verbal altercation with the security guard, and not necessarily because he left class early. Further, the District asserts that in any event this matter is not within the jurisdiction of this tribunal, which has the authority to resolve disputes over special education, but may not resolve the claims that may arise out of a disciplinary action against a school.

61. The record establishes that on the date in question the substitute teacher did not know that Petitioner, under his IEP, was allowed to leave class five minutes early. Teachers, including substitute teaches, are to be aware of the contents of a student's IEP so that they can play their part in implementing the IEP. However, this single failing to inform one teacher that Petitioner's IEP allowed him to leave early did not deny him a free and appropriate public education. Further, even if it were shown that he should not have been subjected to the disciplinary action, such would not establish that he had been denied a FAPE.

Credibility of Witnesses:

62. Mother testified during this proceeding as to a number of the events that have occurred in the past several years. It appeared that her recollection of events was at times in error, but there was no evidence that she was deliberately attempting to mislead the ALJ during the proceeding. Further, the notes she was generating during the course of events appeared as reliable as many of the District's records. As noted in Factual Finding 19, the speech and language therapist credited Mother. for her efforts to improve her son's performance.

63. Ms. Watts and Ms. Barry (the school nurse) were especially credible, both in their demeanor while testifying, and when taking into account regarding their professional skills, training, and commitment. Ms. Barry established that her contact with Petitioner's doctor in order to clarify a prescription from that physician was proper and justified. Ms.

Watts established that Petitioner had potential for further improvement in the areas of speech and language and auditory processing, and that he had made progress toward goals.

64. Mr. Beam, the District's lead psychologist, attested that providing speech and language services to high school students is not especially effective, and that such services are really effective only when the students are young. At least as to Petitioner, this assertion was discredited by Ms. Watt's testimony. Mr. Beam diminished his credibility when he attempted to discredit the assessments performed by Professor Baltaxe and Ms. Atkins, even though theirs were the most extensive evaluations performed by anyone connected with this case. [15] Further, Mr. Beam seems to believe that special education services in the high school setting should concentrate on vocational training and improving activities of daily living.[16] While there is plainly a great need for such education, the academic needs of this student, or others similarly situated, should not be so readily subordinated.

65. Professor Baltaxe and Ms. Atkins were credible in their demeanor, and due to their extensive and superior education, training, and learning. Their impressive resumes were coupled with practical outlooks and suggestions for increasing Petitioner's ability to access his education. While District representatives faulted them for not contacting the District to obtain information or to observe Petitioner, it may be said that the District never contacted them to obtain their input once the assessment reports were produced.

Requested Compensatory Services:

66. (A) The District has failed to provide group speech and language services, as it promised to do. Not only were the hours not provided, they were not provided by a properly trained and properly supervised paraprofessional.

(B). The failure of the District to include Petitioner's mother in the March 2005 IEP led to a home schooling plan that provided little or no educational benefit during a six week period. Further, it was established that Petitioner did not meet goals set for reading, and there was a lack of progress in other areas, although it was shown that he could graduate from school.

(C) The transition services provided to Petitioner have not been adequate to smooth the transition to either further education or the job market.

67. Petitioner could benefit from further individual speech and language services, as he has not met two of the five goals set by Ms. Watts approximately one year ago. More importantly, the failure to provide proper group speech sessions negatively affected his transition, as his social development was not fostered. In these circumstances the District

[15] Mr. Beam testified that an assessment that uses many test instruments should be deemed more reliable than one using a single assessment tool, the latter being likened by him to a "99 Cent Store compass." Yet, the Baltaxe and Atkins assessments used many test instruments, while some school assessments, such as the February 2004 speech assessment used one or two test instruments.

[16] District's counsel relies on such testimony at page 24 of her closing brief, Exhibit 58.

should provide properly supervised group speech services, totaling 35 hours. Because more than 70 hours of individual speech therapy has been provided, and because it has provided an educational benefit, further individual speech services will not be ordered.

68. Petitioner requested 400 hours of educational therapy as compensation for the alleged failure to foster academic progress. Mr. Beam described such services as, in essence, one-to-one special education services. The record does not warrant such extensive services; under his IEP he was to receive 1100 minutes of education per week, or about 18.3 hours. The request for more than a semester of such intense special education does not appear reasonable under the circumstances. However, Petitioner did lose approximately six weeks of instruction when he was at home, and there have been other shortcomings as well. An equitable award of educational therapy is 150 hours, which should concentrate on writing, math, and reading.

69. The District should be ordered to enroll Petitioner in a YES course so that he can rapidly obtain access to the Department of Rehabilitation services.

LEGAL CONCLUSIONS

A. Legal Conclusions Common to All Claims:

The General Principles of IDEA:

1. The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs ...." (20 U.S.C. § 1400(c).)

2. “Free and appropriate public education” means special education and related services that are provided at public expense, that meet the state educational agency’s standards, and conform with the student’s individualized education program. (20 U.S.C. § 1401(8)(A)-(D).) “Special education” is specifically designed instruction, at no cost to the parents to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).)

3. The educational agency may be required to provide “related services”, denominated as “designated instruction and services” (DIS) in California. Such include developmental, corrective, and supportive services that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(22); Cal.Ed. Code § 56363.)

4. (A) In *Board of Education of the Hendricks Hudson Central School District v. Rowley*, (1982) 458 U.S. 176 (*Rowley*), the United States Supreme Court utilized a two-

prong test to determine if a school district had complied with the IDEA. First, the school district was required to comply with statutory procedures. Second, the IEP was examined to see if it was reasonably calculated to enable the student to receive some educational benefit.

(B) Regarding the nature of the educational benefit to be provided, the Supreme Court made clear that the schools are not required to provide the best possible education; instead, the requirement is to provide a student who suffers from disabilities with a "basic floor of opportunity." (458 U.S. at 207-208.) That being said, that basic opportunity must be more than a de minimus benefit. As stated by the Second Circuit Court of Appeals:

> Plainly, however, the door of public education must be opened for a disabled child in a "meaningful" way. Board of Educ. v. Rowley, 458 U.S. at 192. This is not done if an IEP affords the opportunity for only "trivial advancement." Mrs. B. v. Milford Bd. of Educ., 103 F.3d at 1121 (quoting Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183 (3d Cir. 1988)). An appropriate public education under IDEA is one that is "likely to produce progress, not regression." Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (3d Cir. 1997) (internal citation omitted), cert. denied, 139 L. Ed. 2d 636, 118 S. Ct. 690 (1998).
>
> (*Walczak v. Florida Union Free School Dist*. (2d. Cir. 1998) 142 F.3d 119, 130.)

(C) Under the statutes and the *Rowley* decision, the standard for determining whether the District's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment.

5. Procedural errors do not necessarily deprive a student of a FAPE. There must be a substantive harm to the student, such as a loss of an educational opportunity. (See Cal. Ed. Code § 56505, subd. (j): [Hearing officer may not base a decision solely on nonsubstantive procedural errors, unless that error caused pupil to lose educational opportunity or interfered with parent's opportunity to participate in the formulation process of the IEP]; *W.G. v. Bd. of Trustees* (9th Cir. 1992) 960 F2d 1479, 1484; *DiBuo v. Bd. of Educ*. (2002 4th Cir.) 309 F.3d 184.)

6. Pursuant to Title 20 United States Code section 1401, an "individualized education program" (IEP) is a written statement for each child with a disability that is developed, reviewed, and revised in accordance with the IDEA. It contains the following information:

(A) A statement of the child's present levels of academic achievement and functional performance,

(B) A statement of measurable annual goals,

(C) A description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals will be provided,

(D) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child,

(E) A statement of the program modifications or supports for school personnel that twill be provided for the child,

(F) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class,

(G) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments, and

(H) The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

<u>On Credibility Generally</u>:

7. (A) It is settled that the trier of fact may "accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke Davis & Co*. (1973) 9 Cal.3d 51, 67.) The trier of fact may also "reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected material." (*Id*., at 67-68, quoting from *Neverov v. Caldwell* (1958) 161 Cal. App.2d 762, 767.) Further, the fact finder may reject the testimony of a witness, even an expert, although not contradicted. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890.) And, the testimony of "one credible witness may constitute substantial evidence", including a single expert witness. (*Kearl v. Board of Medical Quality Assurance, sup*ra, 189 Cal.App.3d at 1052.)

(B) The rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. Disbelief does not create affirmative evidence to the contrary of that which is discarded. "The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative." (*Hutchinson v. Contractors' State License Bd.* (1956) 143 Cal.App. 2d 628, 632-633, quoting *Marovich v. Central California Traction Co*. (1923) 191 Cal. 295, 304.)

(C) An expert's credibility may be evaluated by looking to his or her qualifications (*Grimshaw v. Ford Motor Co*. (1981) 119 Cal.App.3d 757, 786.) It may also be evaluated by examining the reasons and factual data upon which the expert's opinions are based. (*Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847.)

(D) The demeanor of a witness is one factor to consider when assessing their credibility, a factor not readily established in subsequent judicial review. "On the cold record a witness may be clear, concise, direct, unimpeached, uncontradicted—but on a face to face evaluation, so exude insincerity as to render his credibility factor nil. Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability." (*Wilson v. State Personnel Board* (1976) 58 CA3d 865, at 877-878, quoting *Meiner* v. *Ford Motor Co*. (1971) 17 Cal.App.3d 127, 140.)

B. Legal Conclusions Pertaining to Specific Issues in the Case:

8. Jurisdiction to proceed in this matter was established, based on Education Code section 56501, subdivision (a), and Factual Findings 1 through 4.

9. The Petitioner has prevailed on the claim that the District failed to provide group speech and language services, as promised, and this denied Petitioner a FAPE. Petitioner did not prevail on the claim that the District failed to provide individual speech and language services.

10. (A) The failure to include the individual speech goals in an IEP document until May 2005 was a procedural error given the fact that Petitioner's mother and the speech therapist agreed upon the goals, and implemented them to the benefit of Petitioner. However, based on Legal Conclusion 5 and Factual Findings 15(A), 16, 17(A), 17(B), and 19, such did not deprive Petitioner of a FAPE. The record reveals that the goals and program developed by the speech therapist and Petitioner's mother substantially improved Petitioner's ability to access his education, and there was no evidence that the failure to have the entire IEP team pass on the individual speech goals caused any detriment to Petitioner. Therefore, no remedy shall be provided for that procedural violation.

(B) On the other hand, the failure to draft speech and language goals for the group speech services constituted a procedural error that did deny the Petitioner a FAPE, based on Factual Findings 13(A), 14, 15(B), 16, 22(C), 22(D), 23, and 24. Unlike the situation involving the individual speech and language sessions, where Petitioner's mother and the therapist worked together to develop cogent goals and a structured program, no member of the IEP team ever discussed such goals for the group sessions, and there was no documentation of any strategies or goals for the treatment regime. As found, the group sessions provided little or no benefit to Petitioner.

11. (A) The District failed to provide group speech services by failing to employ a properly-qualified individual to provide that service to Petitioner, and by failing to properly supervise that person. This Conclusion is based on Factual Findings 20 and 22(A) through 25.

(B) Section 44392, subdivision (c) of the Code states that a "'teaching paraprofessional'" means the following job classifications: educational aide, special education aide, special education assistant, teacher associate, teacher assistant, teacher aide, pupil service aide, library aide, child development aide, child development assistant, and physical education aide."

(C) Section 54482 provides that noncertificated teachers' aides shall be "under the direct supervision of a certificated employee of the school district for no less than 75 percent of the time for which he is engaged in the performance of the duties during the day."

(D) The California Code of Regulations, title 5, section 3051.1, provides that an aide for speech and language services may be used when under the "direct supervision" of a credentialed speech therapist.

(E) In connection with the supervision of licensed speech pathology assistants by licensed speech and language therapists, "Direct supervision" means on-site observation and guidance by the supervising speech-language pathologist while a clinical activity is performed by the speech-language pathology assistant." (Cal.Code Regs. tit.16, §1399.170, subd.(c).) This is juxtaposed to the definition of "immediate supervision", meaning the supervision therapist is physically present, and "indirect supervision", meaning that the supervising therapist is not at the facility but is available electronically. As to licensed speech pathology aides, those licensed therapists who supervise them must be physically present unless the licensing board has approved another form of supervision. (Cal.Code Regs., tit. 16, § 1399.154.2, subd. (c).)

(F) The authorities cited above lead to the legal conclusion that a school paraprofessional providing speech and language services must do so under direct supervision, meaning that there is at least on-site supervision of the paraprofessional's activities. Ultimately, such aides are performing the equivalent of a licensed activity that implicates the health and welfare of students receiving the services. It is one thing to propose that a teacher's aide who works in the classroom to assist in traditional teaching—the "three R's"—be allowed to do so unsupervised for part of the day. It is quite another to allow such a person to engage in one of the statutorily-recognized healing arts without any real supervision or control.[17] Mr. Cook was not working under the direct supervision of Mr.

[17] See Business and Professions Code section 2530.1, where the Legislature found that the practice of speech pathology should be regulated and controlled in order to promote the public health, safety, and welfare. The Speech-Language Pathologists and Audiologists Licensure Act, Business and Professions Code section 2530, et seq., is found in Division 2 of that Code, which division pertains to the healing arts.

Kumar within the meaning of common understanding or the aforementioned laws at any time, as set forth in Factual Findings 22(A) through (C).

(G) The failure to provide the group speech services through properly qualified personnel denied Petitioner a FAPE, as provision of special education by qualified personnel is a required element. The Seventh Circuit Court of Appeals addressed a similar issue in *Evanston Community Consolidated School District Number 65 v. Michael M.*, 356 F.3d 798 (7th Cir. 2004). There occupational therapy (OT) was provided by a therapist who was not licensed during part of the time the services were provided. Under applicable state law, her work was then subject to extra supervision, which was not provided. The hearing officer deemed this a technical violation, but ordered some compensatory OT. Rejecting the argument that such a "technical violation" did not warrant compensatory education, the Court stated:

> A FAPE, surely, is an education provided by qualified personnel. In fact, specifically as to occupational therapy, 34 C.F.R. § 300.24(b)(5)(I) refers to "services provided by a qualified occupational therapist." While we are not so naive as to think that licensing ensures qualifications in all instances, to ignore licensing requirements is a step in the wrong direction. (356 F.3d at 803.)

Here it is clear that speech therapy aides or assistants, however classified, should not be working unsupervised, without adequate training, and without the benefit of any IEP goals and milestones, but that is what happened. While the District asserts that Petitioner is attempting to unravel her agreement to receive services from a paraprofessional, that is not the conclusion reached here. Implicit in the mediation agreement was the agreement that the paraprofessional services would actually be provided by qualified personnel under appropriate supervision. The District failed to provide such services and must compensate Petitioner.

12. Finally, regardless of Mr. Cook's qualifications, the District denied a FAPE to Petitioner by failing to provide one hour of group services per week as promised in the Mediation agreement. (Factual Findings 20 through 22(C).)

13. The District has prevailed on the claim that it did not provide a FAPE by failing to make small group tutoring available as promised in the mediation agreement. This Conclusion is based on Factual Findings 13(B) and 26 through 28.

14. The District prevailed on the claim that it did not provide a FAPE by failing to consider the report by Carol Atkins. This Conclusion is based on Factual Findings 13(E) and 29 through 33.

15. (A) The Petitioner prevailed on the claim that the District failed to provide a FAPE by failing to provide appropriate academic instruction and programs, including through the home study process.

(B) The failure to include Petitioner's mother in the March 31, 2005 IEP meeting constituted a procedural violation that denied a FAPE to Petitioner, based on Factual Findings 43 through 46. (See *Shapiro v. Paradise Valley Unified Sch. Dist*. (9th Cir. 2003) 317 F.3d 1072 [holding IEP meeting without parents and without private school teacher denied FAPE].) Here Petitioner's program was radically modified without real input from Mother, reducing Petitioner's programming by approximately 65 percent.

(C) The District failed to comply with the IEP of March 31, 2005, in that it did not provide all of the instruction required in that plan, and thereby denied a FAPE. This Conclusion is based on Factual Findings 47.

(D) The record establishes the goals set in the IEP process, in important core topics, were not met. Further, academic testing showed not only a lack of progress in some areas, but a loss of ground by Petitioner. (See Factual Findings 34 through 41(C).) The ongoing failure to meet the goals set out in the IEP establishes that the District failed to provide an adequate education, one that provided the opportunity to advance, rather than to regress.

16. The Petitioner prevailed on the claim that the District failed to provide a FAPE by failing to provide adequate transition services. As set forth in the Factual Findings (49(A) & (B)), transition services are to be a coordinated set of activities with an outcome oriented process. That was not established in the IEP. Further, the IEP was not wholly complied with. (Factual Finding 52(A) through (C).)

17. (A) The District prevailed on the claim that Petitioner was denied a FAPE because on of the substitute teachers did not know about Petitioner's IEP, based on Factual Findings 59 through 61. In part, this Conclusion follows from the fact that it was not demonstrated that there was any meaningful loss of educational opportunity because Petitioner spent one day in on-campus suspension. This amounts to a procedural violation that does not rise to the level of an actionable claim.

(B) District argues that the issue of Petitioner's one-day suspension is not properly the subject of this proceeding, especially where the Education Code provides for methods to challenge disciplinary action against a student. Section 48917, cited by the District in its closing argument, appears to pertain to expulsions, as opposed to some lesser discipline. That being said, the grant of jurisdiction provided by section 56501, subdivision (a), to hear this dispute over special education services does not go so far as to allow the ALJ to take any action to set aside the discipline, or modify Petitioner's records. That is not the same, however, as denying the undersigned the authority to determine if Respondent failed to follow the laws that pertain to the management of the individualized education plan for each student, where the claim is of a specific statutory violation. If there had been a violation that

warranted some action within the jurisdiction of this tribunal, then such action would be taken, but as set forth above, that has not occurred.

18. Compensatory education services may be awarded as an equitable remedy. (Maine Sch. Admin. Dist. No. 35 v. R. (1st Cir. 2003) 321 F.3d 9, 17-18; Student W. v. Puyallup Sch. Dist. No. 3 (9th Cir. 1994) 31 F.3d 1489, 1497.) The Petitioner has established grounds for an order that compensatory services be provided, based on Legal Conclusions 8 through 12, 15(A) through 16, their predicate findings, and Factual Findings 66(A) through 69. As set forth above, further group speech and transition services are justified, as are some hours of educational therapy, and enrollment in a class that will lead to rehabilitative services. All other requests for compensatory services are denied.

ORDER

Petitioner having prevailed on several issues, the following is ordered:

1. Respondent Antelope Valley Union High School District shall provide Petitioner with thirty five (35) hours of group speech services. Those sessions shall be provided in a group setting, by a paraprofessional who is properly credentialed to provide such services, and who is directly supervised by a duly credentialed or licensed speech therapist. Prior to commencement of the services, the IEP team shall consider and adopt goals and benchmarks for such services. The IEP team shall meet within thirty (30) days of the effective date of this order, and services shall commence within fourteen (14) days of the adoption of the group speech and language goals.

2. Respondent Antelope Valley Union High School District shall provide Petitioner 150 hours of educational therapy, concentrating in the areas of math, reading, and writing, such services to be completed no later than the end of the 2005-2006 school year. The IEP team shall meet to consider and adopt goals and benchmarks for these services at the same time and on the same timelines as set forth in paragraph 1 of this order.

3. Respondent Antelope Valley Union High School District shall enroll Petitioner in the YES program for either the fall 2005 semester, or the spring 2006 semester, and provide him access through that program to the Department of Rehabilitation programming.

DATED: October 19, 2005

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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings